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91-1268

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE CITY OF NEWPORT AND JAMES E. PARSONS,
Petitioners,

v.

ARMINA LEE d/b/a BRASS BULL,
Respondent.

Petition for Writ of Certiorari to the United States Court Of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether a governmental entity's exercise of police powers to abate prostitution should be severely limited by requiring the owner/manager in control of the premises where the illegal activity is occurring to have actual prior knowledge of the illegal activity when procedural due process is not violated.

2. Whether a court should interfere with a governmental entity's exercise of police powers to abate nuisances, in this case prostitution, absent an impingement on a fundamental right or suspect class when there is a legitimate and compelling government interest.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, City of Newport and James E. Parsons, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on Novemer 5, 1991.

REFERENCES TO OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit dated November 5, 1991 is unreported and appears in the appendix to this petition at page 1a. The opinion of the United States District Court for the Eastern District of Kentucky dated February 1, 1991 is unreported and appears in the appendix to this petition at page 16a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 5, 1991. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

U.S. Const. amend. XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED IN THIS CASE

Newport City Ordinance section 26-39 appears in full in the appendix to this petition at page 32a and states in part as follows:

(a) Any license issued under this division may, with notice to the holder thereof and a hearing as hereinafter provided for, be revoked or suspended by the Board of Commissioners.

> (1) If, within twelve months prior to the date on which charges are filed, there has been a conviction of any licensee or his agent, servants or employees, for any action or activity occurring, in, on, or at the premises covered by the license, in violation of any provision of this division or any other division of the City of Newport, or of any criminal or penal statute of the Commonwealth of Kentucky against gambling, disorderly conduct, or any other criminal or penal offense, and a judgment of conviction in any court of competent jurisdiction shall be conclusive evidence of such violation; . . .

STATEMENT OF CASE

This case involves the suspension of Respondent's occupational license after illegal activity admittedly occurred on her business property. The Petitioner, City of Newport, enacted ordinance section 26-39 (hereinafter "Ordinance") which provides that the Board of Commissioners may revoke or suspend an occupational license after notice and an opportunity to be heard, if the licensee or his agent, servants or employees is convicted of criminal activity occurring on the premises. This Ordinance was enacted pursuant to the city's police powers to preserve the safety, health, and morals of the community. Based on the city's unique circumstances and current needs, it enacted the Ordinance for the purpose of reducing the occurrence of criminal activity including prostitution, gambling and disorderly conduct in the city's business establishments. In effect it is a nuisance abatement statute.

Respondent, Armina Lee, owns and operates an adult establishment for which an occupational license is required. Respondent was on the premises six nights a week. In May 1990 two of Respondent's employees were convicted of acts of prostitution that occurred on the Respondent's premises while the Respondent was on the premises. On October 25, 1990 the Petitioner forwarded written notice to the Respondent providing her with notice of charges filed pursuant to the Ordinance against her occupational license. The notice informed the Respondent that she would be entitled to a hearing on the revocation or suspension of her license. Such a hearing was held on January 21, 1991. At the hearing, the Respondent was represented by counsel, cross-examined witnesses and presented both oral and documentary evidence. Following the hearing, the Board of Commissioners deliberated then returned with their findings of fact and conclusions of law. The Commissioners concluded that the Respondent's occupational license should be suspended for a period of six (6) months.

The Respondent filed an action under 42 U.S.C. section 1983 seeking a preliminary injunction in the District Court

for the Eastern District of Kentucky based on various theories.[1] The District Court determined that the City of Newport had exercised legitimate police powers. As to the issue of the presumption of knowledge, the District Court found that the Respondent could be presumed to be aware of or should be aware of any acts of prostitution that occurred in the club without violating her due process rights.

The Respondent filed an appeal and the Sixth Circuit rendered its decision on November 5, 1991. The Sixth Circuit, while treating this as a review of a full hearing on the merits rather than an appeal on the District Court's denial of injunctive relief, held that the Ordinance violated the due process clause of the Fourteenth Amendment because the Ordinance resulted in a presumption of knowledge or eliminated the requirement of knowledge entirely on the part of the owner/operator. The Sixth Circuit also held that the inclusiveness of the conviction of any criminal activity was not rationally related to the purported purpose of the Ordinance.

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[1] Note that Respondent's theory of a First Amendment violation has not been upheld by either court as being valid. Contrary to Respondent's past assertions, this is not a First Amendment case.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit severely limited Newport's legitimate exercise of police power to abate prostitution by requiring the owner/manager in control of the premises where the illegal activity occurred to have actual prior knowledge of the illegal activity.

The Sixth Circuit incorrectly applied a close judicial scrutiny test to the presumption of knowledge requirement in the City of Newport's occupational license ordinance. The result is that the decision severely limits the exercise of Newport's police power to eliminate prostitution and curtail acquired immunodeficiency syndrome ("AIDS") in its jurisdiction. The District Court recognized the compelling interest of the City of Newport in controlling drugs, prostitution, and general rowdiness in the area of the Respondent's establishment in the Court's Findings of Fact, Conclusions of Law and Order.

The right to pursue a business, occupation or profession is subject to the right of the government as part of its police power to impose regulations as the protection of the public requires. *Ferguson* v. *Skurpa*, 372 U.S. 726, 730 (1963) (Kansas statute upheld making it a misdemeanor to engage in a debt adjusting business except as incident to lawful practice of law). The City of Newport's Ordinance is a valid exercise of this police power. This Ordinance protects the public by reducing the occurrence of criminal activity, in this case prostitution, by imposing an affirmative duty upon the occupational licensee to prevent that criminal activity from occurring on the premises. The presumption of knowledge is not unreasonable when applied to an occupational licensee in control of his premises when there has been a history of criminal activity in the area of the licensee's premises. The District Court recognized actual knowledge was not required when it wrote:

> "The court will accept for purposes of this proceeding plaintiff's testimony that she did not have actual

> knowledge of the prostitution. However, in the interest of preventing this evil, the absence of a requirement of actual knowledge is not a flaw in the ordinance so long as the prostitution must occur on the premises of a licensee's control."

The Sixth Circuit improperly required prior actual knowledge holding that anything less violated due process. The Sixth Circuit relied on *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972) (presumption that unwed father unfit to be a parent; no hearing required prior to removal of children) for the proposition that a presumption violates due process. Unlike the Ordinance involved here, *Stanley* involved a suspect class; therefore, a heightened scrutiny by the Court was warranted.

The Sixth Circuit continued its due process discussion by referring to cases that involved the lack of a procedural hearing. *See Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Bell* v. *Burson*, 402 U.S. 535 (1971). This is in sharp contrast to the case at hand in which it is undisputed that the Respondent was provided the following due process protections required for an administrative hearing by *Goldberg* v. *Kelly*, 397 U.S. 254 (1970): 1) timely and adequate notice; 2) right to counsel; 3) the right of presentation of evidence, both oral and written; 4) the right to cross examine adverse witnesses; 5) an unbiased decision maker; 6) a decision on the record; and 7) a written decision with findings and conclusions.

In the present case, the Respondent was afforded each of these protections. The Respondent will not dispute that she received timely or adequate notice or the right to be represented by counsel. The Respondent was afforded and, in fact exercised, the right to present both oral and written evidence and to cross exam adverse witnesses. The proceedings before the Board of Commissioners were on the record and a transcript was made. Finally, the Board's decision was reduced to a writing containing findings and reasons.

II. The Sixth Circuit interfered with Newport's exercise of police power to abate a public nuisance when there was a legitimate and compelling government interest and no impingement on a fundamental right or suspect class.

In the absence of any infringement on a constitutionally protected right or liberty the Petitioner need only show that the presumption requirement is rationally related to its legitimate state goal. *See Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (strict scrutiny applied to fundamental right to travel); *Weinberger* v. *Wisenfield*, 420 U.S. 636 (1975) (intermediate scrutiny applied to a gender-based provision of the Social Security Act). The Ordinance does not impinge upon a fundamental right or suspect class.[2] Therefore, it is not subject to strict or intermediate judicial scrutiny.

The Sixth Circuit acted as a "superlegislature" by improperly weighing the wisdom of Newport's Ordinance. This is contrary to this Court's opinion in *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963) (Court refused to sit as a superlegislature). The *Ferguson* Court went on to say "we emphatically refuse to go back to a time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' " *Id.* at 731-32.

This Court in *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, *reh'g denied*, 343 U.S. 921 (1952) stated that "debatable issues as respects business, economic and social affairs" should be left to legislative decision. *Id.* at 425. There should be nothing debatable by a court about a city's legislative efforts to cleanup prostitution and AIDS. In this case the Court of Appeals has overstepped its boundaries by

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[2] Contrary to inferences by the Sixth Circuit and Respondent, the actions of Petitioner do not implicate the First Amendment. The Ordinance in question is similar to the enforcement of public health regulations in *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697 (1986).

interfering with a legitimate legislative decision. The City of Newport, which is in a better position than the courts to evaluate the facts, made the determination that any criminal activity on a retail establishment's premises constitutes a public nuisance.

In reality this Ordinance is simply no more than a public nuisance abatement statute. The state in the exercise of its police power has the authority to abate nuisances. *Fertilizing Co.* v. *Hyde Park*, 97 U.S. 659, 667 (1878). The legislature has the authority to determine what a nuisance is. *Lawton* v. *Steele*, 152 U.S. 133, 136 (1894). In this case the City of Newport has determined that the occurrence of criminal activity on retail business premises is a public nuisance. The City is subject to constitutional limitations on its exercise of its police power to determine what a nuisance is. *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (per curiam), *reh'g denied*, 446 U.S. 947 (1980). However, this limitation only applies if the Ordinance impinges on a fundamental right or suspect class. *See, e.g., id.* (the court determined that prior restraint on a First Amendment activity was beyond the police power of nuisance abatement). In this case no fundamental right or suspect class is involved.

Finally, the Sixth Circuit's holding undermines the basic tenets established by this Court in *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697 (1986). In *Arcara*, the government entity was allowed to abate the public nuisance of prostitution by the exercise of its police powers of closure. In this case, this Court should not allow the Sixth Circuit to interfere with the City of Newport's exercise of its police powers by requiring the owners/managers in control of the premises where prostitution occurred to have actual knowledge, particularly when weighed against the City of Newport's legitimate interest and duty to protect its citizenry from illegal activity dangerous to the public health, especially in light of the recent AIDS menace.

CONCLUSION

The Newport occupational licensing ordinance is a constitutionally permissible means of abating a public nuisance and preserving the public order, health, safety, and morals of the community. The Ordinance's presumption of knowledge on the part of the licensee is rationally related to the city's goals and duty to protect its citizenry from conduct obnoxious to the morals and general welfare as well as violations of the law. The Ordinance as applied should not be subject to a close scrutiny standard especially when full procedural due process is provided. For these reasons a writ of certiorari should be issued to review the judgment of the Sixth Circuit Court of Appeals.

Respectfully Submitted,

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APPENDIX

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

No. 91-5158

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARMINA LEE, d/b/a BRASS BULL,
Plaintiff-Appellant,

v.

THE CITY OF NEWPORT, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY
(Filed November 5, 1991)

Decided and Filed _____

BEFORE: MILBURN, SHURHEINRICH, Circuit Judges and JORDAN, District Judge.*

* The Honorable Leon Jordan, U.S. District Judge for the Eastern District of Tennessee, sitting by designation.

JORDAN, District Judge. This is an appeal from the judgment of the United States District Court for the Eastern District of Kentucky. The determinative issue in this civil rights action pursuant to 42 U.S.C. § 1983 is the constitutionality of certain provisions of an ordinance enacted by the City of Newport, Kentucky, Ordinance No. 26-39. This ordinance purports to be an occupational licensing provision under which the plaintiff's license to operate an entertainment establishment known as the Brass Bull in Newport was suspended and conditionally revoked. The plaintiff sought injunctive relief in the District Court for the Eastern District of Kentucky, which denied the application for injunctive relief following a hearing. The plaintiff has appealed and for the reasons stated below this Court reverses the judgment of the District Court.

I. FACTS

A hearing on the plaintiff's application for injunctive relief was held in the Eastern District of Kentucky on January 31, 1991. Most of the facts surrounding the suspension of the plaintiff's occupational license are not disputed.[1] The ordinance at issue, section 26-39, provides in relevant part:

> "(a) Any license issued under this division may, with notice to the holder thereof, and a hearing as hereinafter provided for, be revoked or suspended by the Board of Commissioners.
>
> (1) If, within twelve months prior to the date on which charges are filed, there has been *a conviction* of any licensee or his agent, servants or employees, for any action or activity occurring in, on, or at the premises covered by the license, in violation *of any provision of this*

[1] All references to the record will be to the Joint Appendix of the parties, with the notation "J.A." and the relevant page or pages in the Joint Appendix.

> *division or any other division of the City of Newport, or of any criminal or penal statute of the Commonwealth of Kentucky against gambling, disorderly conduct, or any other criminal or penal offense*, and a judgment of conviction in any court of competent jurisdiction shall be conclusive evidence of such violation . . . .
>
> "(b) . . . Upon a decision by the Board of Commissioners to revoke or suspend a license issued under this division, all business activity at that location shall cease immediately for the period of suspension or revocation." (Emphasis added.)[2]

The plaintiff is the owner and operator of the Brass Bull, an adult oriented nightclub. She has operated the nightclub since September 1984, and has been issued an occupational license for every year of operation; the last such license was issued in July, 1990. Ms. Lee testified that at the time of the last license renewal, she was aware that two of her employees had been convicted of acts of prostitution, one of whom was convicted twice, that occurred on the premises of the Brass Bull. Prior to the renewal of her license, one of these employees had been terminated by the plaintiff and the other had left her job voluntarily. As of July 1, 1990, the plaintiff was not offering nude dancing at her club, since she had her liquor license at the that time, but was offering seminude dancing. J.A. 57-59.

On October 25, 1990, the City of Newport (the City) issued the plaintiff a notice to revoke her license. This notice was received by her in early November. Prior to the issuance of the notice, the plaintiff decided to offer nude dancing as

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[2] Compare the provisions of the ordinance declared unconstitutional in *Bayside Enterprises, Inc. v. Carson*, 470 F. Supp. 1140, 1142-1146 (M.D. Fla. 1979).

entertainment and thus surrendered her liquor license to the City and the State of Kentucky. J.A. 16, 59-61.

The City's notice of revocation was based on the three convictions of two employees for prostitution in May, 1990. The plaintiff's uncontradicted testimony was that she was not aware of prostitution or solicitation occurring on the premises of the Brass Bull prior to these convictions. She has all her employees sign a contract in which they are notified that prostitution will not be permitted on the premises. She stated that she neither condones nor encourages such conduct and that any employee who is found engaging in this conduct is fired immediately. She holds weekly meetings with her employees as part of her efforts to oversee their activities. She assigns other employees to supervise the employees and has instructed them as to how such conduct is to be handled. These precautions had been used by her since at least April, 1990. The plaintiff stated in her testimony at the hearing on her application for injunctive relief that by offering nude dancing she was better able to prevent prostitution since she removed the booths from the club, turned up the lighting, eliminated the sale of alcohol, and prohibited all contact between the dancers and customers. J.A. 61-62, 68.

In a letter from the City's law department, dated November 30, 1991, the City offered to settle the revocation proceeding if the plaintiff would cease offering nude dancing and reactivate her liquor license. Another settlement offer had been made on November 19, 1990. The plaintiff declined the settlement offers. J.A. 23-24, 63-64.

On January 21, 1991, a revocation hearing was held before the City commissioners. The plaintiff was present and testified. She explained the efforts she made to control her employees and offered other evidence of the precautions she had taken to prevent prostitution on the premises. This evidence was uncontroverted by the City. J.A. 64-67.

At the hearing in the District Court ten days later, the plaintiff stated on cross-examination that she was working in the club the night on which two of her employees were cited for prostitution. She testified, however, that she saw no in-

dication that these employees were engaged in illegal conduct. These two employees were not arrested by the undercover officer on the same night as their violations and the plaintiff stated that she had no knowledge of the violations until the latter part of April, 1990. J.A. 77-78.

James Parsons testified on behalf of the City. Mr. Parsons is the city manager and has held this position since October 1, 1989. His responsibilities include filing charges against occupational licensees whose licenses may be subject to revocation or suspension. He filed the charges against the plaintiff. While the City has established regulations governing the conduct of businesses engaged in selling alcohol, every business in the City is required to obtain and maintain an occupational license. J.A. 80-82, 114.

The charges against the plaintiff were based on these three prostitution convictions obtained in May, 1990. The charges were lodged on October 25, 1990, against the plaintiff. He stated that the City was aware at the time that these charges were brought that the Brass Bull was offering nude dancing but stated that this fact had no effect on the City's decision. Mr. Parsons was present at the hearing held by the City in January, 1991, on the revocation of the plaintiff's license. As a result of this hearing, the plaintiff's license was suspended for six months and she was placed on probation, during which period of probation another violation would have resulted in the revocation of her occupational license. J.A. 82-85.

Unsupported by the record of the hearing before the City commissioners, Mr. Parsons offered his opinion that the City imposed suspension rather than revocation because the plaintiff attempted to exercise more control over the activities of her employees in her business than did another licensee whose charges had been heard by the City commissioners on the same day. Mr. Parsons testified that prostitution affects the viability of downtown businesses because customers tend to avoid the downtown shopping district due to these kinds of illegal activities. He further stated that since many acts of prostitution are performed by the employees of establishments like

the plaintiff's, the City was attempting to make these establishments assume responsibility for the conduct of their employees to prevent prostitution from occurring. J.A. 86-87.

At the January hearings, the City offered no evidence that the plaintiff had not in fact taken steps to control the behavior of the Brass Bull's employees. No notice was given to the plaintiff that the City was concerned about the degree or extent of control she exercised over her employees. No criminal charge was brought against the plaintiff for permitting prostitution to occur on the premises of the Brass Bull.[3] J.A. 93-94.

He denied that the City was motivated by a desire to eliminate nude dancing in Newport in taking its actions against the plaintiff. The City is investigating occupational license violations in other businesses and not all nude dancing establishments have been charged with license violations. No charges have, however, been processed against or are pending against any other kind of business than adult oriented establishments. Nothing in the occupational license ordinance expressly permits the decision maker to consider any mitigating factors in the determination of whether to revoke or suspend a license and no standard governs the decision maker's discretion as to the nature of the penalty for a violation. J.A. 96-98, 103-106.

Mr. Parsons admitted that he and the City commissioners have publicly expressed their opposition to adult entertainment establishments. These same commissioners had the authority to make the revocation decision concerning the plaintiff's club. He testified that studies have been conducted that indicate a correlation between prostitution, both in the clubs and in the neighborhood of the clubs, and the operation of adult oriented establishments. J.A. 111-113.

In the written decision of the Board of Commissioners, the

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[3] Nothing in the record indicates that a history of prostitution existed at the plaintiff's club and, rather, the record supports the conclusion that these were the first citations for such activities at the Brass Bull.

City found that three charges of prostitution had been alleged to have occurred on the premises on the same evening and had subsequently been reduced to convictions. Based on these convictions, the Commissioners then found the plaintiff guilty of a violation of section 26-39(a)(1) and thus temporarily suspended and conditionally revoked her occupational license. J.A. 27-28.

Following the hearing on the plaintiff's application for injunctive relief, the District Court entered its findings of fact and conclusions of law. The District Court recognized that at the hearing before the Commissioners the uncontradicted testimony of the plaintiff was that she had taken "precautions . . . to prevent prostitution, and denied any awareness that prostitution has taken place." The plaintiff did not deny that acts of prostitution did occur on the premises of the club. J.A. 29, 34, 38.

As to the plaintiff's claim that the ordinance at issue violated her due process rights under the Fourteenth Amendment because it did not require that she have knowledge of the conduct of her employees and imposed strict liability for such conduct, the District Court rejected this contention based on its conclusion that the police powers permitted the City to define the violation so long as the ordinance has a rational basis between its requirements or penalties and a legitimate governmental purpose, inferring that since the plaintiff worked on the premises six days a week, she should be presumed to be aware or should be aware of any acts of prostitution that occurred in the club. The Court addressed the other issues raised by the plaintiff and concluded that no injunction should be issued. J.A. 38-39, 45.

II. ANALYSIS

While the plaintiff has raised a number of issues, the Court has concluded that the issue concerning her lack of knowledge of the acts of prostitution that occurred on the premises is determinative. The effect of the ordinance is either to create a presumption of knowledge or to elimiate any requirement of

knowledge on the part of the licensee or operator of illegal activities or prohibited conduct on the premises based simply on the fact of a conviction of a licensee's employee. The District Court was persuaded that "it is not an irrational presumption that if prostitution were occurring she did know or should have known." J.A. 39. Since the plaintiff's uncontradicted evidence was diametrically contrary to this finding by the District Court, the District Court effectively applied an irrebuttable presumption but one that "presumed a fact which was not necessarily or universally true." *Weinberger* v. *Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 2468 (1975).

In assessing the constitutionality of a presumption, its operation on a protectable right, such as the property interest at stake in the present case, to preculde a licensee from putting on evidence in defense or from having that evidence meaningfully considered can result in a violation of the guarantee of due process embodied in the Fourteenth Amendment.

> " '[W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' "

Stanley v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 1212 (1972) (citations omitted). One of the fundamental purposes of the due process clauses of the Constitution " 'is to allow the aggrieved party the opportunity to present his case and have its mertis fairly judged.' " *Okeson* v. *Tolley School District No.* 25, 760 F.2d 864, 868 (8th Cir.), *on reh.* 766 F.2d 378 (8th Cir. 1985) (citation omitted).

The City has exercised its police powers to require occupational licenses for all businesses conducted within its jurisdiction. In particular, it oversees adult oriented establishments based on studies showing a correlation between the operation of such establishments and certain criminal activities. The Ci-

ty is attempting to induce the operators of these establishments to take responsibility for the conduct of employees who engage in illegal or prohibited activities by threatening suspension or revocation of their occupational licenses. The City hopes that the reduction of the level of such activities would help reinvigorate the downtown shopping district. The Court does not intend to question the validity of this public policy or of the City's interest in preserving the viability of its downtown business district. The question in this case is whether the means adopted by the City to attempt to achieve these goals are constitutional. More specifically stated, the question is whether the application of a conclusive or irrebuttable presumption or the elimination of any knowledge requirements is consistent with meaningful due process in this case?

The right to pursue an occupation is a protected property right that is subject to reasonable regulation. *Wilkerson* v. *Johnson*, 699 F.2d 325, 328 (6th Cir. 1983). Moreover, once a license or permit to engage in some activity regulated by the State is issued by a State, it is a property right that cannot be denied without adequate due process. *Bell* v. *Burson*, 402 U.S. 535, 91 S.Ct. 1586 (1971). Furthermore, in the present case, the plaintiff engages in a business that involves the exercise of First Amendment rights.

Revocation precludes the licensee from operating the business and thus even a temporary suspension or revocation will have substantial consequences for a licensee. "License revocations are so serious as to be treated ' "in the nature of criminal proceedings." ' . . . Procedural requirements are therefore rigorous for a license revocation proceeding." *Richards* v. *Emanuel County Hospital Authority*, 603 F. Supp. 81, 85 (S.D. Ga. 1984) (citing *American Optometric Association, Inc.*, 379 F. Supp. 175 (N.D. Ga.), *aff'd* 491 U.S. 888 (1974)). A licensee is thus entitled to have the opportunity to be heard both at a meaningful time and in a meaningful manner. *Barry* v. *Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 2650 (1979). As the Supreme Court observed in *Stanley*,

> "[p]rocedure by presumption is always cheaper and easier than individualized determination. But, when . . . the procedure forecloses the determinative issues . . ., when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of"

a licensee in the conduct of her business and the exercise of First Amendment rights. 92 S.Ct. at 1215.

The presumption applied by the District Court is entirely distinguishable from that permitted by the Supreme Court in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882 (1976), in which the Supreme Court upheld the presumption that persons with certain findings regarding pneumoconiosis would be entitled to disability compensation. Since the statute at issue in *Turner Elkhorn Mining Co.* was purely an economic regulation that did not touch on or affect fundamental rights, the Court found no difficulty in accepting a legislative determination (presumption) that evidence of disability in certain instances would require payment of total disability compensation. *Id.* at 2896. *Cf. Weinberger* v. *Salfi*, 95 S.Ct. at 2469-2470. What is noteworthy about the presumption in *Turner Elkhorn* is that it does not prevent any person from conducting a business or engaging in an occupation, particularly one implicating the exercise of First Amendment rights, and rather is part of remedial social legislation. *See also Burlington Northern Railroad Co.* v. *Department of Public Service Regulation*, 763 F.2d 1106, 1113 (9th Cir. 1985).

In *Vlandis* v. *Kline*, 412 U.S. 441, 93 S.Ct. 2230 (1973), the Supreme Court of the United States observed that

> "[t]he State's interest in administrative ease and certainty cannot, in and of itself, save [a] conclusive presumption from invalidity under the Due Process Clause where there are otherwise reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised. . . .

> Rather, standards of due process require that the State allow such an individual the opportunity to present evidence . . . ."

93 S.Ct. at 2236. Due process afforded to a person prior to deprivation of a license must be meaningful and appropriate to the case:

> "It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard."

Bell v. *Burson*, 91 S.Ct. at 1591.

Another case involving the application of a presumption, *Leary* v. *United States*, 395 U.S. 6, 89 S.Ct. 1532 (1969), also rejecting administrative convenience as a basis for the existence of a presumption, emphasized that a presumptive inference of guilty knowledge based solely on presence at a place in which illegal activity occurs is generally arbitrary or irrational. *Id.*, at 1548-1549. Unless "it can be said with substantial assurance that one in possession of [an adult oriented nightclub] is more likely than not to know that" prostitution was occurring on the premises of the nightclub, a presumption of knowledge cannot be conclusively applied to justify the revocation or suspension of a license to operate such a business. *Id.*, at 1553.

In addition, although the District Court presumed that the plaintiff knew that prostitution was occurring on the premises of the Brass Bull, the wording of the ordinance would not require the application of a presumption of knowledge to obtain a revocation. All that is necessary to warrant revocation under this ordinance as written is for any employee, servant, or agent of the licensee to have been convicted even once of violating any ordinance of the City or any criminal law of the State of Kentucky. Consequently, if a bookkeeper for the plaintiff was convicted of embezzlement from the plaintiff,

the plaintiff's occupational license could be revoked, despite the fact that the plaintiff would be highly unlikely to know that her bookkeeper was engaged in this kind of criminal activity, since if she were aware of it she would probably take some action to stop it. The ordinance is thus a strict liability provision and the District Court's finding of presumed knowledge was both unnecessary under the ordinance as drafted to obtain a revocation and created an essentially irrebuttable presumption that was contrary to the uncontested evidence that the plaintiff did not know that her employees were engaged in prostitution and that she took reasonable steps to attempt to prevent such conduct on her premises. Nothing that the plaintiff could have shown at her hearing before the City commissioners or in the District Court would have prevented the ordinance from being applied as written. *Cf. Universal Restoration, Inc.* v. *United States*, 798 F.2d 1400, 1406 (Fed. Cir. 1986).

This ordinance is entirely unlike the statute upheld in *Hvamstad* v. *Suhler*, 915 F.2d 1218 (8th Cir. 1990), in which a pattern of convictions was required to permit the abatement of a nuisance by city officials. Obviously, a pattern of convictions of which the operator is given or has notice provides knowledge that such conduct is occurring on the premises. As the Court of Appeals in *Hvamstad* noted, "the abatement statute . . . is designed to encourage property owners to abate the basis for the nuisance themselves by delivering notice of the convictions to the owners." *Id.*, at 1220. Further, the statute in *Hvmstad* was limited to certain enumerated offenses related to the operation of the business and did not allow abatement proceedings to be premised on all types of convictions, whether or not reasonably related to the nature of the business being conducted. Not all prohibitable conduct is necessarily related to a State's legitimate interest in regulating or licensing a particular occupation.

A licensing regulation must contain requirements that are "rationally related to an applicant's fitness for the occupation." *Chalfy* v. *Turoff*, 804 F.2d 20, 23 (2d Cir. 1986). *See also Bruno* v. *Schwarzwalder*, 600 F.2d 124,

129-130 (6th Cir. 1979). The ordinance is not limited to offenses (prostitution, solicitation, service of minors, etc.) occurring on the premises that would be reasonably related to preventing or curing the purported social evils or secondary effects at which the City is claiming to aim and rather extends to any conduct that would be a violation of a City ordinance or a State criminal law, such as embezzlement, regardless of whether such a violation would have any relation to the kinds of problems that the City claims it was attempting to prevent or to cure. The ordinance goes beyond the purposes of preventing or curing the secondary effects supposedly flowing from the operation of establishments like the Brass Bull and reaches conduct that, while may otherwise be prohibited by the State or its political subdivisions, would not result in or contribute to the secondary effects in the downtown area in which these establishments are located but would nevertheless permit the revocation of the plaintiff's license without achieving or furthering the City's purported goal of eliminating these secondary effects.[4] This is clearly arbitrary or irrational.

The ordinance permits the revocation of occupational licenses without any showing that the operator had any control over the conduct of employees or that the operator willfully ignored prohibited activities or otherwise knew of, should have known of, or condoned illegal conduct on the part of the operator's employees, agents, or servants. *Cf. Finer Foods Sales Co., Inc.* v. *Block*, 708 F.2d 774, 777-778 (D.C. App. 1983). As recognized in *Chulchian* v. *City of Indianapolis*, 633 F.2d 27, 32 (7th Cir. 1980), "because of the knowledge requirement, the ordinance does not penalize a

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[4] While the Court does not address the issue of whether the ordinance in the present context violates the First Amendment, the Court notes that the Supreme Court recently held that nude dancing is not unprotected expression, *Barnes* v. *Glen Theater, Inc.*, 111 S.Ct. 2456, 2463 (1991), and this Court has rejected permitting occupational licenses to be revoked when it would violate the First Amendment, *City of Paducah* v. *Investment Entertainment, Inc.*, 791 F.2d 463, 469-470 (6th Cir. 1986).

licensee for an isolated incident over which he has no control." In contrast, in *Genusa* v. *City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), the same Circuit Court of Appeals as decided *Chulchian* observed that an ordinance permitting revocation if the licensee allowed "anything to occur on licensed premises that is in any manner unlawful," *id.*, at 1221, would be constitutional only "[o]n the assumption that [the City] does not mean by this provision to enlarge the licensee's vicarious criminal liability beyond traditional bounds . . . ." *Id.*

Courts faced with similar provisions in State law have readily recognized that equal protection or due process guarantees are implicated when use of convictions unrelated to the government's legitimate purposes deprive a person of the right to engage in an occupation, often relying on *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752 (1957), which held that any qualification or requirement for an occupation must bear a rational relation to the person's fitness to engage in the particular occupation or business, 77 S.Ct. at 756. All such requirements must be tailored to promote the government's interest in regulation of the occupation, based on the nature of the crimes or offenses for which convictions may have been obtained and their relation to the fitness of the licensee to engage in that particular occupation. *See, e.g., Gregg* v. *Lawson*, 732 F. Supp. 849, 854-856 (E.D. Tenn. 1989); *Schanuel* v. *Anderson*, 546 F. Supp. 519, 523-524 (S.D. Ill. 1982), *aff'd* 708 F.2d 316 (7th Cir. 1983). Without both a sufficient showing by the City that the plaintiff's fitness to operate the Brass Bull was affected by the conviction of any of her employees for acts of prostitution or other relevant criminal conduct committed on the premises, such as that she knew or should have known about or condoned such conduct, and without allowing the plaintiff the opportunity to present evidence in defense, fairly considered by the decision maker, the City may not revoke or suspend the plaintiff's occupational license in violation of her right to due process under the Fourteenth Amendment.

Consequently, the provisions of the ordinance now under

review cannot pass constitutional scrutiny under the rational relation test and thus violate the due process clause of the Fourteenth Amendment. These provisions permit the City to deprive an operator of a protected property interest without any relation to the evils at which the ordinance is allegedly aimed and, having no requirement that the operator know or should know from the circumstances that violations of City ordinances or State statutes are occurring on the licensed premises, the ordinance precludes the licensee from showing that the licensee had no knowledge of any such violations. The ordinance thus constitutes an improper imposition of strict liability or creates an irrebutable presumption and is overbroad.

III. CONCLUSION

Accordingly, the Court is of the opinion that section 26-39(a)(1) of the ordinances of the City of Newport is unconstitutional as presently written. The order of the District Court for the Eastern District of Kentucky is REVERSED and this case is REMANDED for action consistent with the opinion of this Court.

ISSUED AS MANDATE: 11/27/91
COSTS: No Costs

[CERTIFICATION OMITTED]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
at Covington

CIVIL ACTION NO. 91-13

ARMINA LEE d/b/a BRASS BULL,
Plaintiff,

vs.

THE CITY OF NEWPORT, ET AL.,
Defendants.

FINDINGS OF FACT/CONCLUSIONS OF LAW AND ORDER

(Filed February 1, 1991)

I. INTRODUCTION

This case arises out of the imminent suspension by a municipal governmant of the occupational license of an adult entertainment nightclub in Newport, Kentucky. Plaintiff owns and operates the Brass Bull. She filed this action under 42 U.S.C. § 1983 seeking damages and injunctive relief after defendants suspended her occupational license to operate the nightclub. This matter is before the court following a hearing upon plaintiff's motion for a preliminary injunction.

II. FINDINGS OF FACT

Newport, Kentucky, is a city of approximately 19,000 inhabitants, located on the Ohio River directly across from Cincinnati, Ohio. The central business district of the City contains approximately 100 businesses and includes, in a five block stretch along Monmouth Street, some eleven or twelve nightclubs offering adult entertainment. Until the summer of

1990, all of these clubs offered semi-nude dancing. The City regulated the amount of covering (such as it is) worn by the dancers under its authority pursuant to the twenty-first amendment to administer the granting of liquor licenses. Beginning in the summer of 1990, several clubs decided to surrender their liquor licenses in order to be able to offer nude dancing. Plaintiff placed her liquor license in dormancy on October 24, 1990 and immediately changed the entertainment format to totally nude dancing.

Since the conversion to nude dancing, no liquor is served at the establishment. This is because under the *Icobucci* decision the City has a valid ordinance prohibiting nude dancing in establishments with a liquor license. *See City of Newport, Kentucky* v. *Icaobucci*, 479 U.S. 92, 107 S.Ct. 383 (1986). The loss of revenue from liquor sales is to an uncertain extent offset by a higher cover charge. Plaintiff testified that her sole reason for changing format was to combat prostitution at the club.

The controversy at hand must be placed in context. The City of Newport has long enjoyed, or suffered, a rakish reputation. Cincinnati, across the river, is devoid of "adult" entertainment. Northery Kentucky, and particularly Newport, provides many such outlets accessible to residents of both sides of the river. The City of Newport has objected with increasing fervor to the effect that such businesses exert on the tenor of life and economic viability of the central business district.

The City Manager, James E. Parsons, referred in testimony to studies in other cities and direct experience in his own that a variety of urban ills attend the operation of adult oriented businesses. Gambling, traffic in drugs and signally, prostitution, have been persistent problems associated with Newport's nightclubs. He represented that police operations, while enthusiastically pursued and effective to a degree, have been unable to curtail these vices. Consequently, the City represents, it has required that club owners take the necessary action to prevent such criminal activities on their premises. The

City employs the occupational license as a tool to require clubowners to police their own premises.

The City of Newport requires that all businesses in the City obtain an occupational license. The granting of the license depends upon compliance with building and zoning codes and other municipal requirements. All businesses are required to renew the license annually. Renewal is a matter of formality only: the application for renewal requires only that the applicant demonstrate that taxes have been paid.

Plaintiff, who had always operated under a valid occupational license, applied for a renewal on April 16, 1990 and received it from the City on July 1, 1990. On October 25, 1990, the City Manager issued to plaintiff a "Notice to Revoke or Suspend Occupational License." The City charged that the Brass Bull had violated section 26-39 of the City Ordinances.

The ordinance provides in part:

> "*Revocation or suspension of license.*
>
> (a) Any license issued under this division may, with notice to the holder thereof and a hearing as hereinafter provided for, be revoked or suspended by the Board of Commissioners.
>
> (1) If, within twelve months prior to the date on which charges are filed, there has been a conviction of any licensee or his agent, servants or employees, for any action or activity occurring in, on, or at the premises covered by the license, in violation of any provisions of this division or any other division of the City of Newport, or of any criminal or penal statute of the Commonwealth of Kentucky against gambling, disorderly conduct, or any other criminal or penal offense, and a judgment of conviction in any court of competent jurisdiction shall be conclusive evidence of such violation;
>
> (2) If there shall occur in, on, or at the premises covered by the license any conduct which is a

> nuisance or obnoxious to the morals and general welfare of the public;
>
> (3) If any person is disorderly in, on, or at the premises covered by the license and disturbs the good order of the community and/or the licensee or his agents, servants, or employees suffer or permit any disorderly conduct in, on, or at the licensed premises; . . .

The City charged that convictions for prostitution at the Brass Bull triggered the revocation ordinance. Two employees of the club were convicted through guilty pleas on May 25, 1990 of three counts of prostitution for activities on the premises of the business. The offenses actually occurred in March and early April. The employees were caught as part of a series of undercover operations undertaken by the police to control illegal activities. Consistent with her policy against prostitution, the night club owner contended, she fired the employees upon their conviction. The owner herself was not the subject of any charges regarding criminal activity.

The notice of suspension or revocation was issued the day after the club changed format. The reason cited for the action, the convictions for prostitution, occurred in May, before the City renewed the club's occupational license on July 1, 1990. The City Manager testified that although the notice of suspension or revocation was filed on October 25, that he had directed his staff several weeks before to gather information which would enable them to proceed against prostitution. This testimony was uncontradicted and the court accepts it. He testified that he had already taken action against one of the semi-nude clubs (Chic's) to control prostitution, and because it had a liquor license, used that as the basis of the regulation. He testified that the existence of nude dancing at the Brass Bull had "no effect whatsoever" on the decision to proceed on the occupational license. The court also accepts this testimony. He testified further that he had approved transfers of occupational licenses when two other clubs had gone from semi-nude to nude dancing and that the City had

not taken any action on that basis to revoke or suspend the license.

The procedure for the suspension or revocation of an occupational license included a hearing before the Board of Commissioners, which was empowered to make the decision to revoke or suspend. Before the hearing, the City and the Brass Bull pursued negotiations to settle the controversy. In a letter of November 15, 1990, the Assistant City Solicitor proposed that the City would dismiss the license revocation hearings "[i]n exchange for the Brass Bull ceasing nude dancing at this particular location . . . now and in the future." Another condition of the deal was that the club take their liquor license out of dormancy and reactiviate it. (Exhibit 3) The City Manager testified that the only reason that the liquor license was dealt with together with the occupational license was that plaintiff insisted on it. The same terms were repeated in a letter of November 25, 1990. The letter specified that the above arrangement would apply only to the Brass Bull and would not apply to any other nude dancing club.

Ms. Lee refused this settlement. A revocation hearing was held on January 21, 1991. At the hearing, plaintiff testified regarding the precautions she had taken to prevent prostitution, and denied any awareness that prostitution had taken place. The City offered no contrary evidence. The City put into evidence that convictions of the Brass Bull employees for prostition. The Board of Commissioners convened to deliberate and issued their ruling that the occupational license would be suspended for six months commencing on February 1, 1991.[1] Additionally, the City revoked the license but held the revocation in abeyance conditioned upon no further violations of the ordinance for eighteen months. Plaintiffs then filed this motion for a preliminary injunction against the suspension of the license. At no time has plaintiff denied that

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[1] At the same meeting of the Board of Commissioners, the occupational license of another nude dancing nightclub, not a party to this suit, was revoked.

her employees had committed on her premises the prostitution offenses as charged.

III. CONCLUSION OF LAW

A. Standard For Preliminary Injunction

The four "particularly important" factors this court must balance in determining whether a preliminary injunction should issue are "(1) the likelihood of plaintiff's success on the merits; (2) whether the injunction will save the plaintiff from irreparable injury; (3) whether the injunction would harm others; and (4) whether the public interest would be served by the injunction." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985).

B. Selective Prosecution

Although plaintiff has made every effort to classify her theory as one for "retaliation" for First Amendment activity (allowing nude dancing), it is clear that her case must stand or fall on the theory of "selective prosecution."

The Supreme Court made this clear in *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172 (1986). There, the Court observed in footnote 4:

> "Respondents assert that closure of their premises is sought as a pretext for suppression of First Amendment protection expression. However, there is no suggestion on the record before us that the closure of respondents' bookstore was sought under the public health nuisance statute as a pretext for the suppression of First Amendment protected material. *Were respondents able to establish the existence of such a speech suppressive motivation or policy on the part of the District Attorney, they might have a claim on selective prosecution.* See *Wayte* v. *United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). Respon-

> dents in this case made no such assertion before trial court."

478 U.S. at 707 n.4, 106 S.Ct. at 3178 n.4 (emphasis added).

Plaintiff's arguments have been either confused or disingenuous on this critical point. Plaintiff keeps arguing the case as if the ordinance and licensure proceeding were specifically aimed at nude dancing. However, the ordinance says nothing about nude dancing. It speaks of offensive activities constituting violations of law or a public nuisance.

Nor does the licensure proceeding charge that nude dancing is a nuisance or violation of law. Rather, it charges that prostitution is a nuisance or violation of law. Yet plaintiff insists on arguing the case as if the City had suspended her license on a charge of nude dancing. Is that because the law favors expression but is tough on prostitution? A cynic might so conclude.

Whether nude dancing is protected by the first amendment is discussed elsewhere in this opinion. But even if it is, the plaintiff ignores the clear statement by the Supreme Court in *Arcara* that the fact that one is engaged in a constitutionally protected activity does not afford one immunity from observing generally applicable laws.

This is only common sense. Suppose plaintiff claimed that she was being prosecuted for allowing prostitution at her establishment because she opposes the war in the middle east, or because she campaigned against the re-election of the Mayor. She might have a case, because such expression is clearly protected by the first amendment. She would, however, have to meet the stringent requirements for showing that she was a victim of selective prosecution. She is no better off because she claims that the prosecution was motivated by her nude dancing.

The criteria for proving up a case of selective prosecution are well established.

> "A defendant asserting selective prosecution:
>
> > bears the heavy burden of establishing, at *least*

> *prima facia*, (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, *and* (2) that the government's discriminatory selection of him has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights.
>
> *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974) [emphasis added]."

United States v. *Peete*, 919 F.2d 1168, 1176 (6th Cir. 1990).

The first and most important element of showing selective prosecution is totally lacking in plaintiff's proof. She admitted that she had no evidence that prostitution was being allowed by the City in establishments that did not have nude dancing. There was positive evidence by the City Manager, however, that the City was trying to root out prostitution wherever it occurred, including in all of the clubs and on the street.

The proof was that proceedings of various types had been initiated against clubs where prostitution had occurred that did not have nude dancing, as well as those that did, in an effort to make the owners face up to their responsibilities in this regard.

Even if the court were to accept the evidence of the plaintiff that the motive of city officials in initiating the licensure proceedings was to prevent nude dancing, which it does not, this is only one of the necessary elements of a case for selective prosecution. The main element, that others similarly situated are not being prosecuted, is lacking. Therefore, the court finds that the probability is that plaintiff cannot succeed on this theory.

C. Due Process

Plaintiff's next argument is that the ordinance in question violates substantive and/or procedural due process by pro-

viding that plaintiff's occupational license may be revoked without her having actual knowledge of the prostitution and even though she made efforts to prevent it on her premises.

The court will accept for purposes of this proceeding plaintiff's testimony that she did not have actual knowledge of the prostitution. However, in the interests of preventing this evil, the absence of a requirement of actual knowledge is not a flaw in the ordinance, so long as the prostitution must occur on premises under a licensee's control.

Although the Court did not discuss this issue directly, the ordinance in the *Arcara* case was substantially similar to that of the Newport ordinance.

This issue was recently addressed, however, in *Hvamstad* v. *Suhler*, 915 F.2d 1218 (8th Cir. 1990), *aff'g* 727 F. Supp. 511 (D. Minn. 1989). In these cases an ordinance very similar to the one at bar were upheld against similar challenges.

The district court there observed:

> "The plaintiff incorrectly asserts that the statute violates due process because it does not allow landowners to contest the validity of the underlying convictions. The legislature, in outlining the number of crimes necessary to automatically invoke the statute, was simply making a judgment under its police power as to what constitutes a nuisance. Such a legislative determination is subject to challenge only if no reasonably conceivable set of facts could establish a rational relationship between the statute and a legitimate end of government. *See, e.g., United States* v. *Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 784-85, 82 L.Ed. 1234 (1938). The legislature could properly conclude that convictions of prostitution or gambling on property are sufficient evidence that the property has become a nuisance. Consequently, plaintiff's due process facial challenge to *Minn.Stat.* §§ 617.80 et seq. must also fail."

727 F. Supp. at 519.

There is one possible factual difference between this case and *Hvamstad*. That is that plaintiff here says she had no knowledge of any prostitution until her two employees were arrested. The three acts of prostitution occurred and then all three arrests were made by the undercover agent later. In *Hvamstad* there was a period of time between the three arrests, so that there was no doubt the proprietor there had actual knowledge of the first offense before the second occurred, etc.

Here, however, plaintiff testified that she worked on the premises six days per week. Therefore, it is not an irrational presumption that if prostitution were occurring she did know or should have known about it.

> "Ordinarily, actual knowledge need not be shown; it is sufficient to show facts from which knowledge may be inferred. Knowledge may be inferred as a matter of fact from evidence showing a course of practice, or frequent acts, of which, in the natural order of things, the accused would have been cognizant and to which his assent would be as a matter of fact naturally implied. But mere negligence, though evidential of the fact of knowledge, is not its legal equivalent."

24 Am.Jur 2d *Disorderly House* § 16 (1983); *see also id.*, § 9; 72 O.Jur. 3d *Nuisances* § 16.

Plaintiff also makes a procedural due process argument that the City Commissioners who held the hearing were biased. However, due process does not disqualify everyone in the City who might have some knowledge of the matter. Only those who have an actual animosity or actual adversarial relationship with the respondent are disqualified. *Hortonville Joint Sch. Dist. No. 1* v. *Hortonville Educ. Assn.*, 426 U.S. 482, 491-92 (1980); *Hammond* v. *Baldwin*, 866 F.2d 172, 176-78 (6th Cir. 1989); *Salisbury* v. *Housing Auth. of City of Newport*, 615 F. Supp. 1433, 1439 (E.D. Ky. 1985). No showing was made of any such relationship here.

Another factor to be considered is whether the crucial facts

are disputed. Here plaintiff has never denied that the three instances of prostitution took place on her premises. That the commissioners gave weight to her evidence in mitigation is indicated by the fact that a permanent revocation of the license could have been imposed instead of the six-month suspension actually received.

D. Vagueness/Overbreadth

Plaintiff argues that the ordinance under which the licensure proceeding was prosecuted was unconstitutionally vague in that it provided that an occupational license may be suspended or revoked in there occurs on the licensed premises "any condition which is a nuisance or obnoxious to the morals and general welfare of the public."

Another provision of the ordinance contains similar provisions with regard to violations of the law. Plaintiff's brief then cites a number of first amendment cases regarding vagueness.

The flaw in this reasoning is the same as in the "retaliation" argument. The ordinance as applied does not address speech or expression, or even nude dancing, if it is expression. It addresses prostitution. Not only is prostitution not protected activity, there can be no doubt that it is "conduct obnoxious to the morals and general welfare," as well as violation of the law.

Modern vagueness doctrine precludes these kinds of evasive tactics. The Supreme Court recently observed:

> "Vagueness challenges to statutes not threatening First Amendment interests are examined in the light of the facts of the case at hand; the statute is judged on an as-applied basis."

Maynard v. *Cartwright*, 108 S.Ct. 1853, 1858 (1988).

The purport of these cases is that in a case like this, a person violating an ordinance concerning prostitution cannot argue that its language is so broad that someone else might be deterred from holding an anti-war demonstration. *E.g.*, *Hvamstad*, 727 F. Supp. at 515-18.

E. Administrative Law Arguments

Plaintiff makes two administrative law arguments: 1) that the Commission, sitting as an administrative agency, lacked standards for guidance; 2) that no judicial review of its decision was permitted. In recent years the standards argument has been generally so weakened as to become a virtual nullity. Indeed, it seems that any sort of standards will do. *See Kentucky Commission on Human Rights* v. *Fraser*, 625 S.W.2d 852 (1981); *Sturgill* v. *Beard*, 303 S.W.2d 908 (Ky. 1957); C. Koch, Administrative Law and Practice § 1.22 (1985). Further, the requirement of standards seems only to apply to delegation of legislative functions. *Cf. Legislative Research Commn.* v. *Brown*, 664 S.W.2d 907 (Ky. 1984). Here the functions were judicial.

In any event, the court finds sufficient standards were present. The ordinance required that activity which was a violation of the law or constituted a public nuisance take place before licensure revocation or suspension could be granted.

Here undenied illegal activity, dangerous to the public health especially in light of the recent AIDS menace, took place on premises under plaintiff's control, when she was, according to her own testimony, actually present on the premises. A penalty substantially less than the maximum was imposed. It seems unlikely that the ordinance's reposing discretion in the Commission worked to the plaintiff's detriment.

The argument of lack of judicial review is indeed a red herring in that the Kentucky courts have held that the state constitution requires that any substantial administrative action may be reviewed for arbitrariness, whether the applicable statute authorizes it or not. This was first held in *American Beauty Homes Corp.* v. *City of Louisville* in 1964 and has been the law ever since. 379 S.W.2d 450 (1964); *see also Fiscal Court of Jefferson County* v. *Don Ridge Land Develop. Co., Inc.*, 669 S.W.2d 922 (Ky. 1984); *Moore* v. *Kentucky State Penitentiary*, 789 S.W.2d 788 (Ky. Ct. App. 1990).

F. Is Nude Dancing Protected By The First Amendment?

Plaintiff has attempted to argue this case as though the City were trying to punish her for exercising her religion or speaking out on public issues. Rather, the City has imposed a penalty for her failing to control prostitution. As pointed out above, she has failed to offer any evidence showing selective prosecution, even if the dancing is protected activity.

However, perhaps a word is in order on whether the first amendment protects nude dancing in a nightclub. Far from placing barroom or nightclub nude dancing on a par with freedom of religion or the right of political speech the Supreme Court has said:

> "Although the customary 'barroom' type of nude dancing may involve only the *barest minimum* of protected expression we recognized . . . that this form of entertainment *might* be entitled to First and Fourteenth Amendment protection *under some circumstances.*"

Doran v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (emphasis added).

This doesn't sound very enthusiastic to me. The entire subject of the status of barroom nude dancing as expression was discussed in several opinions in *Miller* v. *City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (*en banc*). The majority held it was protected, but this court is more persuaded by the dissents, especially that of Judge Easterbrook.

In Judge Easterbrook's view the dancing is expression, the nudity is conduct. Although the expression is protected the nudity is not. To him, if the police power can prohibit streaking and flashing it can prohibit nude dancing, at least in a barroom or nightclub, where it might provoke objectionable conduct. This excellent dissent cites a plethora of decisions where conduct has been controlled although accompanied by some restriction of speech or expression. One such decision involves burning a draft card; another, occupying a public park to protest homelessness.

A short quotation may serve to impart some of the flavor of Judge Easterbrook's views:

> "The First Amendment protects 'the freedom of speech.' Go-go dancing is not 'speech.' James Madison would have guffawed had anyone suggested public nudity as an example of 'freedom of speech' — or of anything that could be derived from the Framers' conception by a series of plausible interpretations. Parading in a state of undress is conduct, not speech. Even Justices Black and Douglas, who thought the First Amendment absolute, rendering all efforts to curtail obscene speech unconstitutional, drew the line here. Dissenting in *Roth* v. *United States*, 354 U.S. 476, 512, 77 S.Ct. 1304, 1323, 1 L.Ed.2d 1498 (1957), Justice Douglas (joined by Justice Black) remarked: 'I assume there is nothing in the Constitution which forbids Congress from using its power. . . to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct.' (Emphasis in original.) What these absolutists gave as a *reductio ad absurdum*, the court today holds the First Amendment commands."

Id. at 1124 (Easterbrook, J., dissenting).

Certiorari was granted in *Miller* by the Supreme Court. Oral argument was just held, and a decision may be expected by July of this year. Although nightclub or barroom nude dancing may be afforded some protection by the Supreme Court, this court finds it unlikely that the degree of protection the Supreme Court allows will be sufficient to withstand the compelling interests of the City of Newport in controlling drugs, prostitution and general rowdiness in the eleven clubs that exist in the five-block area on Monmouth Street.

This is another reason for finding that the probability of success by the plaintiff in this case is insufficient to warrant granting a preliminary injunction. However, I wish to em-

phasize that the main reason is that the plaintiff has failed to introduce even a scintilla of evidence establishing selective prosecution, as discussed above.

CONCLUSION

For the reasons stated, the court finds that the plaintiff has not made the requisite showing for the granting of a preliminary injunction. Primarily, she has demonstrated only a minimal chance of success on the merits.

ORDER

Therefore, the court being advised,

IT IS ORDERED that the motion for preliminary injunction be, and it is, hereby denied.

This 1st day of February, 1991.

/s/ WILLIAM O. BERTELSMAN,
Judge

Feb. 1, 1991
8:15 A.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON
CIVIL MINUTES — GENERAL

Case No. 91-13 At COVINGTON
Style: ARMINA LEE d/b/a BRASS BULL vs. THE CITY OF NEWPORT, ET AL.

DOCKET ENTRY

PRESENT: HON. WILLIAM O. BERTELSMAN, JUDGE
STONEKING, Deputy Clerk
McCARTHY, Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
MICHAEL O'HARA

ATTORNEYS PRESENT FOR DEFENDANTS:
MICHAEL L. SCHULKENS
HARRY D. RANKIN

PROCEEDINGS: HEARING ON MOTION FOR INJUNCTION PENDING APPEAL

O R D E R

On March 26, 1991 the above-styled case was called for a hearing on plaintiffs motion for injunction pending appeal.

The Court having heard counsel and having been sufficiently advised, it is

ORDERED that said motion be, and hereby is, DENIED. The Official court reporter, Debra Hamilton McCarty be, and hereby is, directed to file said transcript as to the Court's oral findings.

This 27th day of March, 1991.

/s/ WILLIAM O. BERTELSMAN
Judge

Copies:
M. O'Hara/R. Lotz
M. Schulkens/H. Rankin

Initials of Deputy Clerk krs

ORDINANCES OF THE CITY OF NEWPORT, KENTUCKY

SECTION 26-38

Administration

This division shall be administered by the Director of Finance, or his duly designed representative, under the direction of the City Manager. The Director of Finance, with the approval of the City Manager, shall have the authority to issue and promulgate such rules and regulations as he may consider necessary for the administration of this division, provided such rules and regulations are not inconsistent with the provisions of this division. No license shall be issued for any unlawful activity, or for any business that the Director of Finance with the approval of the City manager shall consider to be detrimental to the public welfare or contrary to the public interest, but any such decision to refuse to issue a license may be appealed to the Board of Commissioners.

SECTION 26-39

Revocation of suspension of license.

(a) Any license issued under this division may, with notice to the holder thereof and a hearing as hereinafter provided for, be revoked or suspended by the Board of Commissioners.

(1) If, within twelve months prior to the date on which charges are filed, there has been a conviction of any licensee or his agent, servants or employees, for any action or activity occurring in, on, or at the premises covered by the license, in violation of any provision of this division or any other division of the City of Newport, or of any criminal or penal statute of the Commonwealth of Kentucky against gambling, disorderly conduct, or any other criminal or penal offense, and a judgment of conviction in any court of competent jurisdiction shall be conclusive evidence of such violation;

(2) If there shall occur in, on, or at the premises covered by the license any condition which is a nuisance or obnoxious to the morals and general welfare of the public;

(3) If any person is disorderly in, on, or at the premises covered by the license and disturbs the good order of the community and/or the licensee or his agents, servants, or employees suffer or permit any disorderly conduct in, on, or at the licensed premises;

(4) If the licensee or his agents, servants or employees shall misrepresent any material facts as to the kind of business in his return, or any other fact necessary or proper to determine the amount of license tax to be paid.

(b) When the City Manager has probable cause to believe that a license should be revoked for any of the causes enumerated herein, it shall be his duty to prefer charges against the holder of such license by filing a statement of such charges against the holder of such license with the City Clerk. The charges shall be in writing and each charge shall be clearly set out. Within three days after the filing of said charges with the Board of Commissioners, a notice of the filing of said charges and of the time of the hearing thereof shall be mailed to the licensee at the address shown on the license, and a hearing before the Board of Commissioners shall be held within ten (10) days after the filing of said charges with the Board. The evidence shall be transcribed and the action and decision of the Board of Commissioners on the charges shall be reduced to writing and recorded in the minute book. *Upon a decision by the Board of Commissioners to revoke or suspend a license issued under this division, all business activity at that location shall cease immediately for the period of suspension or revocation.*

(c) *Any license issued for furnished or unfurnished apartments, may with notice to the holder thereof and after hearing, be revoked or suspended by the Board of Commissioners:*

(1) If the licensee or his agent continually and persistently allows conditions to exist in or about the premises so as to create a public nuisance on the premises or suffers or permits those persons occupying any rental unit to make or cause to be made on premises any loud, unnecessary, or unusual noise which either annoys, disturbs, injures, or endangers the comfort, repose, health, peace or safety of others with the city limits.

(2) If the licensee continually and persistently so as to create a public nuisance on the premises suffers or permits those persons occupying any rental unit to cause inconvenience, annoyance, or alarm or wantonly create a risk through engaging in fighting or in violent, tumultuous, or threatening behavior, or causing a hazardous or physically offensive condition by any act that serves no legitimate purpose or

(3) If the licensee continually and persistently so as to create a public nuisance on the premises suffers and permits those persons occupying a rental unit to emit nauseous, noxious or disagreeable odors, effluvia, or stenches extremely repulsive to the physical senses of reasonable persons which annoy, cause discomfort, injury or inconvenience to others within the city.

(d) When the City Manager has probable cause to believe that a residential rental property license should be revoked for any of the causes enumerated in this section, he shall give notice to the licensee or his agent of the intention of the city to revoke the rental license. This notice shall:

(1) Be in writing.

(2) Set forth the alleged violations of this subchapter.

(3) Describe the rental property and dwelling unit if known where the public nuisance is alleged to exist.

(4) Provide a reasonable time, generally not to exceed 30 days, to abate the nuisance.

(5) Notify the licensee or his designee of the premises or dwelling unit responsible for compliance of the alleged violation by certified mail.

(6) State that the violation must be corrected within 30 days and describe the procedure and time limit to apply for a reconsideration or formal hearing before the City Manager.

(e) If the nuisance is not abated or after a hearing before the City Manager satisfactory arrangements for abatement are not assured by the building owner, charges shall be filed with the City Clerk in writing, and each charge shall be clearly set out.

(f) Within three days after the filing of the charges with the City Clerk and Board of Commissioners, a notice of the filing of charges and the time of the hearing thereof, shall be mailed to the property owner/licensee or his agent. A hearing before the Board of Commissioners shall be held within ten days after the filing of the charges with the Board. The evidence shall be transcribed and the action and decisions of the Board of Commissioners on the charges shall be reduced to writing and recorded in the minutes book.

(g) If the owner has filed an action for a writ of forcible detainer in the District Court of Campbell County or for any action of ejectment in a court of competent jurisdiction for eviction of a tenant, then any proceeding before the City Manager or the Board of Commissioners shall abate pending a final determination by the court. If the court shall refuse to evict the offending tenant and the licensee has made a good faith effort to abate the nuisance by eviction, then any pending proceeding before the City Manager or the City Commission for a license revocation shall be dismissed at the request of the licensee. Dismissal shall not prevent the city through the Community Development Division, from implementing this subchapter to abate future or continuing nuisances occurring on rental permises, or taking other actions pursuant to other ordinances of the City of Newport.

(h) Upon revocation of a rental property license by the Board of Commissioners, the property shall be vacated as soon as possible in accordance with Kentucky State Statutes and City Ordinance related to evictions. Once all units in a building have been vacated, no unit shall be rented again until the owner has submitted sufficient proof to the Board of Commissioners that all causes of the nuisance have been removed. The owner may request re-instatement of the license by petitioning the Board of Commissioners in writing and submitting sufficient proof that the nuisance has been abated.